

**Fair Political Practices Commission
Memorandum**

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of 2003 Regulation Calendar

Date: November 26, 2002

I. INTRODUCTION

This memorandum outlines the staff's recommendations for the Commission's CY2003 rulemaking plan. The rulemaking/project calendar is attached as **Appendix 1** and is consistent with the Commission's stated priorities for next year and the priorities set out in the staff memorandum in October. We have added several items either pursuant to Commission guidance or due to the lack of a November meeting (resulting in the shifting of some items to 2003). We have indicated these items with a "**NEW**" or "**CHANGED**" indicator.

Lower priority items that were summarized in the October memorandum have been eliminated from the calendar, consistent with the Commission's direction in October. The work plan also allows for quarterly review and revisions and attempts to spread the workload as evenly as possible throughout the year. The staff recommends approval of the regulatory calendar as described below.

II. CHANGES TO THE PROCESS

Finally, the table reflects changes in process which the Commission approved in principle in October. The specifics of the changes in process will be presented in a separate memorandum in this same agenda packet.

III. STATUTORILY REQUIRED OR OTHERWISE HIGH-PRIORITY ITEMS

Regulation 18312 Rulemaking Procedure

[NEW]

The Commission will consider streamlining the regulation adoption process. Customarily, the Commission holds interested persons meetings, pre-notice hearings and adoption hearings on most regulatory items. All of these steps are labor intensive. The Commission's staff recommended in October that the Commission forego the interested persons meetings and the pre-notice discussion stages for CY2003. The Commission agreed with this in principle.

Regulation 18313: Forms and Manuals**[New]**

Regulation 18313 addresses the adoption of Commission forms and manuals, including the mandatory notification of interested members of the public of new or revised forms and manuals or supplements thereof. Under the existing regulation 18313(b), the Commission is required to mail a copy of a new or revised publication to its list of interested persons no later than 30 days prior to consideration of the form or manual. An amendment is proposed to subdivision (b) to specifically allow electronic mail (e-mail) and web-based notification of interested persons in lieu of conventional mail. It is the intent that conventional mail notification still will be provided for those persons without access to a computer or e-mail account. The proposed electronic notification is intended to provide interested persons with more timely and flexible notification of Commission publication activities, as well as make the most efficient use of Commission resources under current budgetary limits.

Section 87302.6: Newly Created Boards and Commissions

Section 87302.6 will be added to the Act effective January 1, 2003. (Chapter 264, Stats. 2002.) That section will require members of boards and commissions of newly created state and local agencies to file statements of economic interests in the same manner as officials covered by section 87200 until the agency has an approved conflict of interest code. Section 87302.6 does not specify where these statements will be filed and staff recommends that the Commission adopt a regulation to clarify the place of filing. It may be necessary to adopt a regulation on an emergency basis.

Regulation 18702.1 (AB 1797): Declaring a Conflict of Interest

This bill requires that a public official who holds an office specified in section 87200 and who has a financial interest in a decision publicly identify the financial interest giving rise to the conflict of interest, recuse himself or herself from discussing and voting on the matter, and leave the room until after the discussion, vote, or other disposition of the matter is concluded, except as specified. As proposed, regulation 18702.1(a)(1) may need amendment to define exactly what must be disclosed about the financial interest that qualifies as “in detail sufficient to be understood by the public.” Further, the new statute may need amendment to clarify that the public official can only speak as a member of the general public, and not as representative of his agency or clients. This requirement could be added back into the regulations through an amendment to step two (regulation 18702, et seq.), which is where it was located previously. Another option would be to add it to the end of the eight-step process when the public official has determined that he or she does indeed have a conflict (i.e. regulation 18709).

**Section 87103.5 (AB 2366): Retail Merchants’
“Public Generally” Exception**

This bill added new subsections (b) and (c) to section 87103.5. Subsection (b) adds an alternative method to determine when income received from a customer does not meet the threshold to become a financial interest. Specifically, with respect to a jurisdiction with a population of 10,000 or less that is located in a county with 350 or fewer retail businesses, this exception applies if the amount of income received by the business entity from the customer does not exceed one percent of the gross sales revenue of the business entity.

Regulation 18707.5, which pertains to existing section 87103.5, will need revision. Currently, it gives definitions and lays out the way to apply the section 87103.5 procedure. However, the first part of the regulation (subsection (a) and the note below it) would only apply to the new subsection (a) of the statute and would need modification to apply to subsection (b). Subsection (b) of the regulation would still apply to the entire statute, but the “have reason to know” section of subsection (c) would need to be reevaluated to determine if the assumption is still valid under the new statute.

Section 89519: Surplus Funds**[NEW]**

The general rule of the personal use law is that any expenditure of campaign funds must be, at a minimum, reasonably related to a political, legislative, or governmental purpose associated with the candidate's office. (Section 89510.) However, where an expenditure confers a substantial personal benefit on the candidate, the expenditure must be directly related to a political, legislative, or governmental purpose. (Section 89510.)

Where campaign funds become surplus campaign funds, the personal use law further limits their expenditure. An interpretive regulation was adopted by the Commission in 1990 to specify when funds become surplus under different scenarios. However, the Office of Administrative Law rejected the regulation and it was never refiled.

Since the advent of Proposition 34 and its numerous transfer and termination provisions, the treatment of surplus campaign funds has once again become an issue. Staff proposes recodifying the former regulation (former regulation 18587).

Regulation 18452. CalPERS’ Reporting Requirements.

Section 84225 requires candidates for the Board of Directors of CalPERS to file certain campaign reporting statements. Regulation 18452, as directed by statute, sets forth the filing schedule and describes the contents of those statements. CalPERS prepared an election schedule that provided for runoff elections under certain circumstances, requiring amendment of regulation 18452, since the regulation makes no provision for the filing of statements required by law during runoff election cycles. CalPERS’ regulation authorizing runoff elections was successfully challenged in court, making amendment of regulation 18452 unnecessary.

However, CalPERS Board of Directors has appealed that adverse decision. If it receives a favorable ruling prior to next year's election, the CalPERS Board will adopt an election schedule providing for a runoff election, which would require amendment of regulation 18452. Therefore, this regulation has been placed on the calendar in preparation for possible runoff elections that may occur in the event of a favorable outcome of CalPERS' appeal, in the event that decision is handed down prior to next year's election. Please note, this item was previously considered at a pre-notice stage and has been noticed for adoption. Therefore, we are scheduling it for an adoption hearing only.

IV. ON-GOING PROJECTS: CAMPAIGN

The agendas for the early months of the year are generally filled with the adoption hearings for regulations considered at the pre-notice stage in the 4th quarter of 2002 and other carry-over items. Several items were started or raised in CY2002 and their resolution is recommended as a first priority item.

Proposition 34 Update.

At the outset of its implementation of Proposition 34, the Commission made a conscious decision to interpret the measure through the public rulemaking process rather than through advice letters. In the two years since Proposition 34 was enacted, the Commission has adopted or amended over 40 regulations and issued two opinions relating to its provisions. In addition, the Commission made several major policy decisions, first pertaining to the campaign reporting requirements under the new law, then focusing on discrete areas such as outstanding net debt, transfers, carry-over, and expenditure limits.

The Commission's work has been quickly implemented as campaign contribution limits and the new disclosure requirements of Proposition 34 took effect at the statewide level in the March primary election. It is too soon to tell what additional major policy issues will be raised by full implementation of Proposition 34 in the November general election. November 2002 is the first general election to which these provisions apply. Staff anticipates that there will be a need for further review of the implementation of Proposition 34. Consequently, we have incorporated general updates in the calendar and we expect that there will be regulatory projects growing out of these updates.

"Independent Expenditure" (Regs. 18225.7 and 18225.8); § 82031.

Regulation 18225.7 defines expenditures "made at the behest of" a candidate, which include coordinated expenditures treated as contributions under the Act. It is anticipated that staff will present for further pre-notice discussion or adoption extensive revision of the current regulation in December 2002, to more clearly and specifically define conduct that constitutes coordination. It may be necessary to continue work on this item in 2003.

Regulation 18225. Expenditure**[NEW]**

The Commission will discuss “express advocacy” as defined in this regulation. No regulatory action is currently anticipated.

**Requested Amendment Regulation 18116: Filing Dates.
August 5, 2002 letter from Colleen C. McAndrews.****[CHANGE]**

An issue concerning filing late contribution reports (“LCRs”) on the weekend arose at the December 2001 meeting during consideration of permanent adoption of Proposition 34 regulations 18539 (online disclosure of contributions) and 18550 (online disclosure of independent expenditures). Regulation 18116 provides that when reports filed under the Act are due on a Saturday, Sunday, or official state holiday, the deadline is changed to the next working day, except for late contribution reports and late independent expenditure reports. The weekend extension applies to the new \$1,000 and \$5,000 reports added by Proposition 34, but does not apply to the traditional late contribution reports. Colleen McAndrews of Bell, McAndrews, Hiltachk and Davidian submitted two letters to the Commission on March 8, 2002, and August 5, 2002, suggesting that the weekend extension be applied to traditional LCRs. Ms. McAndrews suggested that traditional late contribution reports should not be excepted out of the next regular business day extension in regulation 18116. She suggested that weekend 24-hour reporting could be preserved for LCRs on the final weekend before the election, but that prior weekends could be excepted out.

CHANGE: Consistent with the Commission’s direction, we have moved this item up to an earlier meeting.

Regulation 18428: Affiliated Entities**[CHANGE]**

Regulation 18428 addresses the disclosure and notification requirements of affiliated entities that participate in the financing of elections. (§ 84211.) Originally, regulation 18428 implemented the Commission’s *Kahn* ((1976) 2 FPPC Ops. 151) and *Lumsdon* ((1976) 2 FPPC Ops. 140) opinions requiring a “combination of persons” file one campaign statement. The regulation defined “affiliated entities” as “a person or group of persons whose campaign contributions are directed and controlled by another.” Further work concerning the disclosure requirements is needed. Amendments to Form 460 are anticipated.

CHANGE: An interested persons meeting was added for January and the March pre-notice hearing eliminated. The item is set for either a May pre-notice hearing or a May adoption, depending on the feedback received at the interested persons meeting.

V. ON-GOING PROJECTS: CONFLICT OF INTEREST AND OTHERS

Regulation 18704.2: Property “Subject of” a Decision

[CHANGE]

Regulation 18704.2 sets out a list of factual situations in which an official’s real property interest is considered directly involved in a governmental decision. In December of 2000, the Commission added two situations (formerly defined as “indirect” situations) into regulation 18704.2. These provisions dealt specifically with (a) real property located within 300 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision, and (b) decisions involving the construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities. In connection with this relocation of text, the Commission also increased the distance at which an official’s real property is considered to be directly involved from 300 feet to 500 feet.

In this regard, an issue has arisen as to whether the “500 foot rule” embodied in Regulation 18704.2 is applicable only to the decisions expressly set forth in the regulation, or whether it can be applied to decisions that are not expressly included in the regulation. A literal reading of the new language would limit the “500 foot” test only to those decisions listed in (a)(1) through (a)(6). In other words, an official with real property within 500 feet (or 50 feet for that matter) of real property subject to a decision not expressly listed in (a)(1) through (a)(6) would be subject to a presumption of nonmateriality.

CHANGE: Due to the heavy December agenda and linkage of this item with the general plan project, this item has been pushed to a January adoption.

Conflict of Interest and General Plans.

[CHANGE]

Some agencies are viewing general plan amendments as coming within the purview of “zoning or rezoning” decisions under subdivisions (a)(1) and (a)(6) of regulation 18704.2. Because general plans cover the entire jurisdiction, officials of these agencies believe they cannot participate in such decisions unless the “public generally” or “legally required participation” exceptions apply. This results in substantial difficulties, in that all of the members of a governing board of an agency may be unable to participate in some of the most fundamental decisions affecting the entire jurisdiction. Staff is anticipating regulatory action involving clarification of and refinement to the conflict-of-interest rules as applied to these types of decisions. This project will also include consideration of the “segmentation and bifurcation” procedures referred to in Commission advice letters. The procedure is used when a governmental decision may be “segmented” into a series of decisions in which a public official may have a conflict in one decision in the series but not others.

CHANGE: Pre-notice discussion was originally set for the December 2002 Commission meeting. Due to the heavy number of regulations set for that meeting, the pre-notice hearing has been reset to January 2003. Adoption continues to be set for March 2003.

Regulation 18700: Basic Rule: Guide to Conflict-of-Interest Regulations. [NEW]

In 1998 a chart was inserted into this regulation indicating the relocation of the various rules as part of the massive restructuring of the conflict-of-interest regulations that was adopted that year. Since that time, the conflict-of-interest regulations have gone through several more revisions and the usefulness of the chart is diminished. The Commission will consider removing the chart.

Regulation 18707.3: Small Cities Public Generally Regulation. [CHANGE]

Regulation 18707.3 provides an exception geared specifically toward small jurisdictions. Several amendments were made to this regulation to make it consistent with the amended materiality regulations applicable to real property. The City of Yountville has also raised concerns with the application of this regulation in that it incorporates the “500-foot rule” as one of the preconditions for application of the “public generally” exception for small jurisdictions. Basically, when a circle is drawn using a 500-foot radius from the residences of city council members, the resultant areas encompass much of the town. Staff is currently reviewing the regulation to see if language can be tailored to meet this unique concern of small cities.

CHANGE: This item will be scheduled for pre-notice hearing in December. This has not changed. However, the adoption hearing has been advanced to January 2003, from the later original date of March 2003.

Regulation 18329.5: Formal Written Advice and Informal Assistance. [NEW]

This item includes procedures that will enable the Commission to effectively advise individuals of an agency, or code reviewing bodies, on the content of an agency’s conflict of interest code. The proposal stems from implementation of the Commission’s review of issues pertaining to conflict of interest codes and SEIs.

Guidelines and procedures for filing officers/officials. [NEW]

The project also stems from the Commission’s review of issues pertaining to conflict of interest codes and SEIs. Guidelines to be considered including: (a) Initial notification requirements (timelines); (b) Required contacts or attempted contacts with each non-filer, and documentation requirements for those contacts; and (c) Authority to hold filing officers/officials accountable for failing to comply with notification requirements. *Regulatory action contingent on passage of legislation.*

Regulation 18703.3: Disclosure of Incentive Income (*In re Hanko*):

On August 9, 2002, the Commission adopted *In re Hanko* (O-02-88), which held that payments to a hospital district director from her employer will be attributed to a purchaser of her employer’s products where the public official: (1) has been employed to purposefully direct sales or marketing activity toward the purchaser; (2) has indirect contact with the purchaser, intended

by the public official to general sales or business; and (3) has a direct relationship between the purchasing activity of the purchaser and the amount of the incentive compensation received by the public official. Where these requirements are met, both the purchaser and the employer are considered sources of income to the official for purposes of sections 87100 and 87103.

Consistent with this holding, the Commission directed staff to investigate possible amendment of Commission regulations to require disclosure of incentive income, similar to that currently required under the “commission income” regulation.

III. OTHER REGULAR ITEMS

Annual Technical Clean-up.

The Commission considers annually changes to Commission regulations that resulted from the staff’s review for technical and other minor changes.

Quarterly review of work plan and plan updates, including Proposition 34.

Regulation 18991: Selection of Local Candidates and Controlled Committees for Audit.

The Commission is required to select cities and counties for campaign audits grouped by population. For example, 15 percent of total jurisdictions of 700,000 or more are selected for audit through a random selection process. Under the current regulation, the population size that determines the grouping is based on the most recent decennial federal census. Enforcement staff recommends changing that to require use of the most recent population estimates published by the Department of Finance. These reports are published each May and therefore result in greater accuracy on population totals. This regulation will be presented for pre-notice discussion in December, and adoption in January of 2003.